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Supreme Court, U.S.
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No. 92-1915

In The

Supreme Court of the United States

October Term, 1992

YOUELL & COMPANIES AND
INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

GETTY OIL COMPANY AND TEXACO INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Texas**

APPENDICES TO RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX A

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO, INC.,	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES	§	280TH JUDICIAL DISTRICT
	§	(Filed Sep. 20, 1989)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Getty Oil Company, succeeded by and a division of Getty, Inc. ("Getty"), files this Motion for Partial Summary Judgment, as follows:

I.

ISSUES INVOLVED IN THIS MOTION

Getty seeks summary judgment on three issues. Getty asks the Court to (1) construe the key provision of the contract that is the focus of this litigation, and declare that it imposes an obligation on NL Industries, Inc. ("NL") to extend existing insurance coverages separate and apart from any obligation to indemnify; (2) determine that the Duncan Accident for which Getty was assessed liability in previous litigation was an occurrence

which was within the risks insured against by the insurance protecting NL and (3) determine that Chapter 127 of the Texas Civil Practice and Remedies Code does not prohibit the contract involved in this litigation. Pursuant to Rule 166a(d) Tex. R. Civ. P., Getty asks that the Court, to the extent that it does not grant summary judgment on the issues presented, to ascertain what material facts are without substantial controversy, and deem those facts established for trial on the remaining disputed points.

II.

BACKGROUND AND DEFINITIONS

In November, 1983, Carl Duncan ("Duncan") was injured when a barrel of chemicals called Drop WT-210 exploded at Getty Well No. 116 in West Texas, at which he was working, dousing him with the flammable chemical and burning him severely. Duncan eventually died from the injuries he suffered as a result of the accident (the "Duncan Accident"). His legal representatives and heirs brought litigation in the 130th District Court of Matagorda County, Texas, Cause No. 84-S-0194C, styled *Carl Duncan, et al. v. Getty Oil Corp., et al.*, (the "Duncan Case"), to recover damages for Duncan's injuries and eventual death. Judgment was entered on April 24, 1985, against Getty alone, for the sum of $28,727,000 in compensatory and punitive damages.

The barrel of chemicals which exploded was sold to Getty by NL under Blanket Purchase Order No. HB-5357, dated effective August 1, 1983 (the "NL-Getty Contract"). The NL-Getty Contract expressly incorporated the terms of a document entitled "Work Order Conditions." A true

and correct copy of the contract in question is attached as Exhibit "D" to the affidavit of W. Allen Brumley, filed herewith (the "Brumley Affidavit").

The NL-Getty Contract was one of a series of blanket purchase orders initiating in 1979 and continuing until 1984 (*see* Exhibits A through D of the Brumley Affidavit), as related to the Getty Midland District operations. Each of such blanket purchase orders contained the "Work Order Conditions." A continuing course of conduct by both NL and Getty, consisting of purchases, deliveries, treatments and other operations, both before and after the Duncan Accident, occurred under such blanket orders (see the Brumley Affidavit). See also the affidavit of Kenneth M. Miller (the "Miller Affidavit") submitted herewith).

At the time of the Duncan Accident, NL maintained a policy of general liability with the Insurance Company of North America, Policy No. SCG2097470 (the "INA Policy"). In addition, NL was covered by excess insurance referred to as Companies Collective Policies, being Policies Nos. 551/UPA0067 ("Collective I Policy") and 551/UPA0068 ("Collective II Policy"), (collectively referred to as the "Collective Policies"). Also, NL was insured by a policy of umbrella insurance issued by a group of Lloyd's syndicates, being Policy No. 551/UQA0049 (the "Lloyd's Policy"). Attached to the affidavit of Joe G. Roady filed herewith (the "Roady Affidavit") as Exhibits "A," "B" and "C" to such affidavit are true and correct copies of the policies. The Defendants have admitted in pleadings filed in this case, and there is no dispute, that NL was the insured under the INA Policy, the Collective Policies, and

the Lloyd's Policy and that such policies were in effect at the time of the Duncan Accident.

III.

SUMMARY JUDGMENT ISSUES

A. CONSTRUCTION OF THE WORK ORDER CONDITIONS

At the focus of this litigation is the blanket purchase order contract dated effective August 1, 1983 (the "NL-Getty Contract"). Getty purchased certain chemicals from NL under the NL-Getty Contract, covered by the Work Order Conditions of the contract, including the barrel of Drop WT-210 which was involved in the Duncan Accident. The contractual obligations of the parties are defined by those documents. The language of the contractual provisions in issue is clear and unambiguous. Paragraph 4 of the Work Order Conditions provides:

> INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:

WORKMEN'S COMPENSATION		STATUTORY
EMPLOYERS' LIABILITY		$500,000
GENERAL LIABILITY:	BODILY INJURY	500,000
	PROPERTY DAMAGE	COMBINED SINGLE LIMIT
AUTOMOBILE LIABILITY:	BODILY INJURY	500,000
	PROPERTY DAMAGE	COMBINED SINGLE LIMIT

All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers.

Seller shall indemnify, defend and hold harmless Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages resulting from injury to any person (including injury resulting in death), or damage (including loss or destruction to property of whatsoever nature of any person arising out of or incident to the performance of the terms of this Order by Seller (including, but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order). Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.

The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

Under the terms of the Work Order Conditions, NL, as "Seller," had several obligations to Getty, as "Purchaser." One contractual obligation was for NL to provide Getty with all of the insurance coverage actually carried by NL, pursuant to the provision stating, "All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser, its co-owners and joint venturers (if any), to the full extent of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser, its co-owners, joint venturers, agents, employees and insurance carriers." The only possible construction of this language (hereafter referred to as the "Extension of Coverage Provision") is that NL was required to extend existing insurance coverage to Getty, so that Getty would be entitled to invoke the coverage in connection with the Duncan Accident.

1. The Language of the Work Order Conditions is Unambiguous

The task of this Court is to enforce the agreement of the parties as found in the language of the Work Order Conditions. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 727-28 (Tex. 1981) . The intent of the parties as expressed in the language of the contract is controlling, unless the terms of the contract are ambiguous. *Id.* Whether the Extension of Coverage Provision is unambiguous is a question of law. Thus, Getty is entitled to a summary judgment if only one reasonable interpretation of the Extension of Coverage Provision exists. *Coker v. Coker*, 650 S.W.2d at 394; *Gulf &*

Basco Co. v. Buchanan, 707 S.W.2d 655, 657 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.).

The language of the Extension of Coverage Provision clearly and explicitly states that *all* insurance carried by NL must also protect Getty, even if that insurance is not required by other provisions of the Work Order Conditions. In other words, while the first paragraph of Paragraph 4 required certain minimum insurance coverage, the second paragraph (the Extension of Coverage Provision) required the extension to Getty of existing coverages, whether or not obtained in compliance with the minimum coverage obligation. The words, "All insurance coverages carried by Seller [NL] . . . shall extend to and protect Purchaser [Getty] . . . " can have no other meaning but that in relation to its dealings with NL, and the products supplied to it by NL, Getty is entitled to the protection of all insurance coverage carried by NL during the term of the contract.

2. The Separate Obligation to Provide Getty with NL's Insurance Coverage

The obligation of NL that Getty be protected by NL's existing insurance contracts is separate and distinct from the other contractual obligations created under Paragraph 4 of the Work Order Conditions. In the first provision of Paragraph 4, NL agreed to maintain specified minimum amounts and types of insurance acceptable to Getty. In addition, under the third provision of Paragraph 4, NL had the contractual obligation to indemnify, defend, and hold Getty harmless from losses resulting from NL's negligence arising out of the performance of the contract.

Thus, there are at least three distinct and separate obligations imposed by the language of Paragraph 4: (1) for NL to maintain minimum liability insurance coverage; (2) for NL to provide to Getty the coverage of its existing insurance policies; and (3) for NL to indemnify Getty from losses resulting from NL's negligence in the performance of the contract. The third obligation, concerning indemnification, was resolved by the results of the Duncan Case, in which NL was found to be zero percent (0%) negligent for the Duncan Accident. Getty's cross-claim for contribution and indemnity in the Duncan Case was therefore denied. Consequently, NL had no obligation to indemnify Getty in connection with the Duncan Accident. However, the requirement that Getty be protected under NL's existing insurance policies is a different requirement and has not been adjudicated.

The Defendants contend that the obligation to provide insurance coverage to Getty existed only to support the obligation to indemnify Getty. That argument ignores the unambiguous language of Paragraph 4 of the Work Order Conditions. The Extension of Coverage Provision is a specific command: the coverages of existing policies "*shall* extend to and protect" Getty. The word "protect" connotes broad coverage, such as would pertain to an additional insured, rather than a narrow coverage, such as limited to indemnity. Importantly, *there is no mention of a limitation to indemnity* either in the language of the Extension of Coverage Provision or elsewhere.

Read alone, the Extension of Coverage Provision obviously cannot be construed as limited only to a coverage of NL's indemnity obligation, as defendants contend. Nor may that reading be applied when the provision is

considered together with *all* of the language of Paragraph 4. For example, the last sentence of Paragraph 4 explicitly states that the liability of NL under Paragraph 4 is *not* limited by the insurance coverage it must maintain. This provision has two effects: (1) it means that the indemnity liability may be greater than the minimum insurance required; and (2) it confirms that if existing coverages exceed the minimum amounts required, the liability to Getty either on the indemnity *or otherwise* is not limited to the minimum amounts. Hence, NL's obligations concerning insurance and indemnity, while potentially overlapping where indemnity is concerned (the indemnity liability, when found to exist, could be paid through resort to the required minimum insurance), do not coincide where the Extension of Coverage Provision is concerned. Thus, the last sentence of the paragraph is a recognition that either the indemnity obligation or the Additional Insurance Provision may result in the imposition of liability in an amount greater than the minimum required insurance. It cannot be read as imposing on the Extension of Coverage Provision a limitation to coverage of the indemnity only. The Extension of Coverage Provision must involve a separate obligation.[1]

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[1] It is significant to note that the meaning of the last sentence was broadened by a change occurring first in the 1982-83 version of the contract (HB-5250). Prior to that contract (*see* HB-4856, Exh. B to the Brumley Affidavit), the last sentence read as follows, with the included portion deleted in subsequent versions:

> The liability of seller *under the provisions of this Purchase Order under which Seller agrees to defend,*

To confirm that the Extension of Coverage Provision involves a separate obligation, the third paragraph (the indemnity provision) of Paragraph 4 concludes with the statement that insurance covering the indemnity agreement shall be provided by NL. This is the *third* time specific insurance requirements are stated: first, the minimum requirement; second, the Extension of Coverage Provision; and third, the requirement to cover the indemnity. If the Extension of Coverage Provision is related to indemnity, why have the provision requiring insurance to cover the indemnity? If the Extension of Coverage Provision is co-extensive with the indemnity obligation *there is no need for a specific requirement for insurance to cover the indemnity.*

Further, the requirement for insurance to cover the indemnity is clearly distinct from the obligation to extend full protection to Getty under NL's insurance policies because the Extension of Coverage Provision states, "All insurance coverages carried by [NL], *whether or not required hereby,* shall extend to and protect [Getty] . . . "

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indemnify and hold harmless Purchaser shall not be limited by the insurance coverage required of Seller hereunder.

In HB-5250 and HB-5357 (the NL-Getty Contract) the deleted language was replaced by the phrase "as herein above provided." Where formerly the "not limited by" provision related only to the indemnity obligation, the later versions (including the 1983-84 version involved here), referred to *all* of the obligations of Paragraph 4. The intent was obviously to broaden the effect of the last sentence of the paragraph. The effect is an obvious recognition that more liabilities are provided for in Paragraph 4 than merely indemnity. The obligation (and potential liability) to extend the benefits of existing coverage is one of these other, separate liabilities.

The command is: "Notwithstanding and in addition to the required minimum coverage, and notwithstanding and in addition to any insurance required to cover the indemnity, whatever coverage NL maintains shall extend to and protect Getty." Stated another way, the effect of the phrase "whether or not required hereby," as applied to the remainder of the sentence, is to say, (1) "when insurance is specifically required by this contract, NL's existing coverage protects Getty"; and (2) "NL's existing coverage protects Getty even if coverage is not specifically required by other provisions of this contract." So read, the operative language then, as applied here, is, "All insurance coverages carried by (NL) shall extend to and protect (Getty)." There can be no dispute about the meaning of such words.

As a matter of law, the Extension of Coverage Provision of Paragraph 4 imposes a distinct and different duty than the indemnification requirement. The clear and unambiguous meaning of the Extension of Coverage Provision is that, regardless of NL's other obligations to Getty or the insurance coverage required of it, Getty must be extended the protection of the coverage of any insurance policy which covers NL.

The distinction between an obligation to indemnify and an obligation to provide insurance has been drawn by the Fifth Circuit Court of Appeals. In *Voisin v. O.D.E.C.O Drilling Company*, 744 F.2d 1174 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985), a case arising in Texas, the Fifth Circuit ruled that a cause of action based on contribution and indemnity was not the same as a claim for failure to provide insurance. In *Voisin*, a contract existed which required all of the third-party defendant's insurance policies to name the third-party plaintiff as an

additional insured. The contract also contained an indemnity provision operating in favor of the third-party plaintiff. Although the indemnification provisions were found to be illegal under a particular section of the Longshoremen's and Harbor Workers' Compensation Act, the Fifth Circuit did not invalidate the contractual requirement to provide insurance. The Court viewed the indemnification provision of the contract and the requirement to provide insurance as different obligations and held that the third-party defendant had breached its obligation to add the third-party plaintiff as an additional insured on its insurance policies.[2]

As a matter of law, the meaning of the Extension of Coverage Provision is that all insurance coverage carried by NL must be extended to and protect Getty.

Reasonable minds cannot differ that the meaning of the language of the Work Order Conditions is to entitle Getty to the protection of NL's insurance; therefore, there are no issues of material fact relating to the interpretation of the Extension of Coverage Provision of Paragraph 4 of the Work Order Conditions. The Court should enter partial summary judgment as a matter of law declaring the meaning of Paragraph 4 as applied here, and declaring that Getty is entitled to the protection of the insurance coverage carried by NL at the time of the Duncan Accident.[3]

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[2] This distinction has also been recognized in the Ninth Circuit, in *Price v. Zim Israel Navigation Company,* 616 F.2d 422 (9th Cir. 1980).

[3] Decision of this issue establishes NL's liability to Getty. However, this is a separate issue from the question of whether

B. THE DUNCAN ACCIDENT WAS AN OCCURRENCE COVERED BY NL's INSURANCE POLICIES

Getty also seeks a determination from the Court that the Duncan Accident was a type of occurrence which was covered by each of NL's insurance policies. The terms of the insurance policies are clear and unambiguous. Copies of the several policies are attached to the Roady Affidavit.

1. The INA Policy.

The INA Policy protecting NL is a general liability policy. The policy period for the INA policy was from March 1, 1983 to March 1, 1984. The Getty Accident occurred on November 22, 1983, clearly within the policy period.

The INA Policy covers "all sums which the Insured shall become legally obligated to pay as damages because of (A) Bodily Injury or (B) Property Damage to which [the] insurance applies, caused by an occurrence . . . " (Coverage Part I). "Occurrence" is defined under the INA Policy in Endorsement No. 20 as, "An Event, including injurious exposure to, Conditions, which results during the policy period in Bodily Injury or Property Damage Neither expected nor intended from the standpoint of the Insured." Hence, the Duncan Accident, which resulted in

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Getty is entitled to enforce the NL policies against INA and Youell. That question requires inquiry into issues raised by the affirmative defenses pleaded by NL's insurers, such as satisfaction of policy conditions, waiver, voluntary payment, and the like, as to which the facts are not yet sufficiently developed.

bodily injury to Carl Duncan was an "occurrence" as defined under the INA Policy.

In addition, INA is legally obligated to pay the amount of damages NL must pay, defined as "damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property including consequential damages resulting from property damages." (Endorsement No. 21). The injuries and death of Carl Duncan clearly fall within the definition of "bodily injury", which under the INA Policy is "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom . . . " (Definitions). Under its insurance policy, INA's liability is limited to $1 million for each occurrence of Bodily Injury Liability, as provided in Endorsement No. 3 (Revised).

Also, the "policy territory" means, in pertinent part, "(1) the United States of America, its territories or possessions, or Canada, or . . . (3) anywhere in the world with respect to damages because of bodily injuries or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory . . . " (Definitions) The Duncan accident is obviously within the territorial limits of the INA Policy coverage.

Also, none of the exclusions of the INA Policy apply to the damages resulting from the Duncan Accident. Hence, the Duncan Accident was an occurrence resulting in damages for which INA provided insurance coverage to NL, under the terms and definitions of the INA Policy.

Pursuant to the terms of the INA Policy, Getty requests the Court enter a summary judgment that the Duncan accident is an occurrence covered by the provisions of the INA Policy.

Finally, both NL and INA have admitted that INA provided a defense to NL in the Duncan Case, without reservation of rights, which is tantamount to an admission that the INA Policy covered the Duncan Accident. See NL responses to Getty Requests for Admissions Nos. 23, 24, First Set; INA responses to Getty Requests for Admissions Nos. 15, 16, First Set.

2. The Collective I Policy

NL was also covered by three numbered excess policies (each having several forms of separate policies collectively constituting the coverage), with Youell & Companies representing all the insurers. The policy period for the Collective I Policy was from March 1, 1982 to March 1, 1985, within which the Duncan Accident occurred.

The Collective I Policy provides coverage in excess of the INA Policy, for the "ultimate net loss" up to $5 million. (Insuring Agreements II). The term "ultimate net loss" is defined as:

> . . . the total sum which the Assured or his Underlying Insurers as scheduled, or both, become obligated to pay by reason of personal injuries, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid

> as salaries, wages, compensations, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurers permanent employees.

(Definitions 7.)

By its Collective I Policy, Youell & Companies agreed to pay the damages, as defined, for "all sums which the Assured shall be obligated to pay by reason of the liability (a) imposed upon the assured by law, or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in its capacity as such, for damages on account of personal injuries caused by or arising out of each occurrence happening anywhere in the world." (Insuring Agreements I). An "occurrence" under the Collective I Policy means "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period." (Definition 5). The Duncan Accident is within the definition of "occurrence" and the injuries and death suffered by Duncan fall under the term "personal injuries" under the Collective I Policy.

The phrase "personal injuries" is defined as, "bodily injury (including death at any time resulting therefrom),

mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities." (Definitions 2).

No exclusions under the Collective I Policy applied to the Duncan Accident.

The Duncan Accident resulted from an explosion of the chemicals called Drop WT-210, manufactured by NL. The accident is an occurrence covered by the Collective I Policy. The liability of the Collective I Policy is $5 million, in excess of the coverage of the INA Policy (Insuring Agreements I).

3. The Collective II Policy

The term of the Collective II Policy was March 1, 1982 to March 1, 1985. The Collective II Policy provided coverage in excess of the INA Policy and the Collective I limit. The limit of the Collective II Policy is $5 million, which shall be paid after the INA and Collective I Policy limits are met. (Insuring Agreements II).

The coverage of the Collective II Policy is co-extensive with Collective I. The Collective II Policy covers "each occurrence happening anywhere in the world, and arising out of the hazards covered by and as defined in the underlying umbrella policies stated in Item 2 of the Declarations and issued by the Insurers as specified thereunder." (Insuring Agreements I). The underlying umbrella policy referred to by the Collective II Policy in

Item 2 is the Collective I Policy. Thus, the Duncan accident falls within the coverage provided by the Collective II Policy, since the Collective I Policy coverage extends to the Duncan Accident.

4. The Lloyds Policy

The Lloyds Policy was effective from March 1, 1983 to March 1, 1984. The Lloyds Policy provided umbrella coverage in excess of the INA and Collective Policies, up to $20 million in liability. (Insuring Agreements II). Like the Collective II Policy, the coverage of the Lloyds Policy is co-extensive with that of the Collective I Policy. (Insuring Agreements I). Hence, the Duncan Accident is an occurrence covered by the Lloyds Policy, since the Collective I Policy covered such an event.

In summary, as a matter of law, the terms of the INA Policy, the Collective Policies, and the Lloyds Policy cover the Duncan Accident. Partial summary judgment should be entered declaring that the Duncan Accident was an insured occurrence under the insurance carried by NL.

C. APPLICATION OF CHAPTER 127 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

Getty requests a declaration from the Court that Chapter 127 of the Texas Civil Practice and Remedies Code, relating to indemnity provisions in certain mineral agreements, does not apply to the claims of Getty.

Chapter 127 of the Civil Practices and Remedies Code, in general, voids a contract relating to oil, gas, or water wells, when the contract purports to indemnify a party against its own negligence. (Tex. Civ. Prac. Code § 127.003) (hereinafter, references to Sections are to the Civil Practices and Remedies Code). The Legislature has determined that agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state. (Section 127.002). However, Chapter 127 of the Civil Practice and Remedies Code is not applicable to the present contract. Getty requests a summary judgment declaring that Chapter 127 does not prohibit the enforcement of the Extension of Coverage Provision of the NL-Getty Contract.

First, Section 127.006 expressly states that the provisions do not affect the validity of an insurance contract. The provisions of Paragraph 4 of the Work Order Conditions of the NL-Getty Contract (quoted on pages 4-5) requiring the extension of insurance coverage, thus at minimum making Getty an "additional insured," are, as a matter of law, an "insurance contract". Thus, the claims of Getty to enforce the provisions giving it additional insured status are outside of the scope of Chapter 127 by the Chapter's own terms.

No cases have been decided which construe Chapter 127 and the meaning of "insurance contract". The question is therefore one of first impression.

However, status as an "insurance contract" of a contract obligating a party to provide insurance in the precise context of a co-existing obligation to indemnify is confirmed by *Voisin v. O.D.E.C.O. Drilling Company*, 744

F.2d 1174 (5th Cir. 1984), previously discussed. *Voisin* holds that the two obligations are entirely separate. The prohibition of Chapter 127 of the Civil Practice and Remedies Code applies *only* to agreements to indemnify negligent parties. The claims of Getty in this action do not arise from NL's obligations to indemnify Getty; they are based on NL's obligation to provide insurance coverage. Thus, the statute is inapplicable.

Moreover, Section 127.003 acts to void an agreement purporting to indemnify a person against his own negligence or the concurrent negligence of someone directly responsible to the indemnitee. The terms of Paragraph 4 explicitly state that Getty will *not* be indemnified for losses resulting from *Getty's* sole negligence. The indemnity provisions do not contravene the statute. The terms of Chapter 127 thus have no bearing on Paragraph 4.

Accordingly, Chapter 127 of the Texas Civil Practice and Remedies Code is not applicable to the present litigation as a matter of law. The Court should enter a partial summary judgment declaring that the obligation in the NL-Getty Contract for NL to extend to Getty the coverage of existing insurance is not prohibited by Chapter 127.

WHEREFORE, Getty requests that the Court declare (1) that the terms of the Work Order Conditions obligate NL to extend to Getty the insurance coverage carried by NL at the time of the Duncan Accident; (2) that the Duncan Accident was an occurrence covered by the insurance policies protecting NL; and (3) that Chapter 127 of the Texas Civil Practice and Remedies Code does not prohibit the enforcement of the Extension of Coverage Provision of the NL-Getty Contract. Further, to the extent

that the matters submitted are not fully adjudicated, Getty requests that the Court, pursuant to Rule 166a(d), Tex. R. Civ. P., ascertain what material facts exist without substantial controversy and enter an order specifying such facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Motion For Partial Summary Judgment of [sic] was served upon counsel of record listed below by delivery on this ____ day of September, 1989.

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APPENDIX B

CAUSE NO. 89-01695

GETTY OIL COMPANY AND TEXACO, INC. Plaintiff,	:	IN THE DISTRICT COURT OF
VS.	:	HARRIS COUNTY, TEXAS
NL INDUSTRIES, INC., ET AL Defendants	:	280TH JUDICIAL DISTRICT

==========

CHARGE OF THE COURT

Members of the Jury:

This case is submitted to you by asking a question about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will

not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the question accordingly. Simply answer the question, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers, that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer the questions submitted to you "yes" or "no" unless otherwise instructed. A "yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." If the questions direct you to give an answer other than "yes" or "no," you must still base your answers on a preponderance of the evidence with respect to each matter inquired about in the question.

You are instructed that preponderance of the evidence means the greater weight and degree of credible evidence introduced before you and admitted in this case.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by witnesses who saw the act done or heard the words spoken or by documentary

evidence. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

You are instructed that an agreement for the sale of goods may be made in any manner sufficient to show agreement including conduct by both parties which recognizes the existence of such an agreement.

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing or course of performance

A "course of dealing" is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Where an agreement for sale, if any, involves repeated occasion for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

You are instructed that the HB purchase order documents are not sufficient in and of themselves to create a legally binding agreement.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and

then you will deliberate upon your answers to the questions made.

It is the duty of the presiding juror:

1. To preside during your deliberations;

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. To write out and hand to the bailiff any communications concerning the case which you desire to have delivered to the judge;

4. To vote on the questions;

5. To write your answers to the questions in the spaces provided; and

6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the judge, and your presiding juror has placed your answers

in the spaces provided, and signed the verdict as presiding juror or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ Tony Lindsay
HONORABLE TONY LINDSAY
Judge, 280th District Court

TL:lt

QUESTION NO. 1

Was Work Order Conditions Exhibit "A" a part of an agreement between NL and Getty at the time of the sale of the barrel of chemicals that occurred on 9-15-83?

Answer "Yes" or "No"

Answer: Yes

CERTIFICATE

We, the Jury, have answerd [sic] the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

(To be signed by the presiding jury if unanimous.)

/s/ James G. Steffen
Presiding Juror

(To be signed by those jurors who agree with the verdict if not unanimous.)

PLEASE PRINT	SIGNATURE
1._____	1._____
2._____	2._____
3._____	3._____
4._____	4._____
5._____	5._____
6._____	6._____
7._____	7._____
8._____	8._____
9._____	9._____
10._____	10._____
11._____	11._____

_____

APPENDIX C

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO INC.,	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES.	§	280TH JUDICIAL DISTRICT

ORDER

ORDERED THAT Plaintiffs' (i) Motion for Summary Judgment filed on September 20, 1989; (ii) Second Motion for Partial Summary Judgment filed on December 21, 1989; (iii) Response to Youell and NL's (Second) Motion for Summary Judgment filed on January 5, 1990; and (iv) Plaintiffs' Response to Defendants' (Third) Motion for Summary Judgment filed March 2, 1990 together with English and American's Response to Youell and NL's Motion for Summary Judgment filed on January 5, 1990 and English and American's Response to Defendants' (Third) Motion for Summary Judgment filed on or about March 2, 1990, the depositions previously filed with the Court and all summary judgment proof, exhibits and other papers filed in connection with any of the above

referenced pleadings shall collectively be considered as a response to Defendants' pending Amended Motion for Summary Judgment scheduled to be heard on March 30, 1990. It is further

ORDERED THAT Youell and NL's (Second) Motion for Summary Judgment filed on or about November 28, 1989 and Defendants' Reply to Plaintiffs' Response to Youell and NL's (Second) Motion for Summary Judgment filed January 10, 1990 shall collectively be considered in the pending Motion for Summary Judgment. It is further

ORDERED THAT all pleadings are subject to objections previously raised. It is further

ORDERED THAT the Court shall also consider all replies filed, with leave of Court, within seven (7) days of the hearing on March 30, 1990.

Signed March 23, 1990.

/s/ Tony Lindsay
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

SHEINFELD, MALEY & KAY
A Professional Corporation

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APPENDIX D

NO. 89-01695

GETTY OIL COMPANY, SUCCEEDED BY AND A DIVISION OF TEXACO INC.,	§	IN THE DISTRICT
	§	COURT OF
	§	
	§	HARRIS
V.	§	COUNTY, TEXAS
	§	
INSURANCE COMPANY OF NORTH AMERICA, NL INDUSTRIES, INC. d/b/a NL TREATING CHEMICALS, INC. and YOUELL AND COMPANIES.	§	280TH JUDICIAL
	§	DISTRICT
	§	
	§	(Filed
	§	Jun. 04 1990)
	§	
	§	
	§	
	§	

AMENDED DESIGNATION OF TRANSCRIPT

Getty Oil Company and Texaco Inc. ("Texaco"), pursuant to Rule 51, Tex. R. App. P., hereby designate the contents of the transcript on appeal, requesting the District Clerk to prepare and transmit to the Court of Appeals a transcript containing the following matters:

1. Plaintiffs' Original Petition in No. 86-CV-0988, filed 8-25-86.

2. Plaintiffs' Original Petition in No. 87-CV-2038, filed 11-18-87.

3. Defendant NL Industries' Original Answers Subject to Joint Motion to Transfer Venue, filed 8-26-88.

4. Original Answer of INA, filed 8-26-88.

5. Original Answer of Companies Collective Subject to Joint Motion to Transfer Venue, filed 8-26-88.

6. Defendant INA's First Amended Answer with Affirmative Defenses, filed 9-26-88.

7. Defendants' Original Answer Subject to Motion to Transfer Venue in No. 87-CV-2038, filed 9-26-88.

8. Youell and Companies' Amended Answer to Plaintiffs' Petitions Subject to Motion to Transfer Venue, filed 10-17-88.

9. Order of Consolidation of Nos. 86-CV-0988 and 87-CV-2038.

10. Order Transferring Venue from Galveston to Harris County, filed 12-19-88.

11. NL Industries' Motion for Summary Judgment, filed 1-27-89.

12. Plaintiffs' Request for Admissions to Youell and Companies, filed 1-30-89.

13. Plaintiffs' Request for Admissions to INA, filed 1-30-89.

14. Plaintiffs' Request for Admissions to NL Industries, Inc., filed 1-30-89.

15. Youell and Companies' Motion for Summary Judgment, filed 1-31-89.

16. INA's Motion for Summary Judgment, filed 2-09-89.

17. Plaintiffs' Amended First Set Request for Admissions to Youell and Companies, filed 2-15-89.

18. Plaintiffs' Second Amended Petition, filed 2-22-89.

19. Youell and Companies' Requests for Admissions to Plaintiffs, filed 2-24-89.

20. Plaintiffs' Response to Motions for Summary Judgment of INA Youell and NL, filed 2-24-89.

21. Affidavit of Annette Kolodize, filed 3-01-89.

22. Affidavit of Irvin Apffel, filed 3-03-89.

23. Order Denying Defendants' Motion for Summary Judgment, dated 3-16-89.

24. Youell's Third Party Action Against Travelers Insurance Company filed 3/31/89.

25. Youell's Response to Plaintiffs' Request for Admission, filed 3-31-89.

26. Plaintiffs' Response to Youell's Request for Admissions, filed 3-31-89.

27. NL's Response to Plaintiffs' Request for Admissions, filed 3-31-89.

28. INA's Response to Plaintiffs' Request for Admissions, filed 3-31-89.

29. NL's Motion For Leave to Join Third Party Defendant filed 5-03-89.

30. Youell's Amended Third Party Action, filed 5-05-89.

31. INA's Request for Admissions, filed 5-08-89.

32. Plaintiffs' Second Set Request for Admissions to NL Industries, filed 5-26-89.

33. Plaintiffs' Second Set of Request for Admissions to Youell, filed 5-26-89.

34. Plaintiffs' Second Set of Request for Admissions to INA, filed 5-26-89.

35. Plaintiffs' Objections to INA's Request for Admissions, filed 6-08-89.

36. Response of Youell to Plaintiffs' Request for Admissions, filed 6-29-89.

37. INA's Answers to Plaintiffs' Second Set Request for Admissions, filed 6-29-89.

38. NL's Responses to Plaintiffs' Second Set of Requests for Admissions

39. Plaintiffs' Responses to INA's Request for Admissions, filed 7-05-89.

40. Plaintiffs' Amended Second Set Request for Admissions to INA, filed 7-07-89.

41. Order Granting Leave to Join Third Party Defendant English and American, dated 7-12-89.

42. Order Granting Leave to File Third Party Action Against Travelers, dated 7-12-89.

43. Youell and Companies Third Party Action Against Travelers and English and American, filed 7-13-89.

44. INA's Answers to Plaintiffs' Amended Second Set Request for Admissions, filed 8-02-89.

45. Order Granting Youell's Leave to File Third Party Action Against Travelers and English and American, dated 8-07-89.

46. Youell and Companies Amended Third Party Action Against Travelers and English and American, filed 8-07-89.

47. NL's Request for Admissions, filed 8-31-89.

48. Travelers' Original Answer, filed 9-15-89.

49. Plaintiffs' Responses to Request for Admissions of NL Industries, filed 9-15-89.

50. Plaintiffs' Motion for Partial Summary Judgment, filed 9-20-89.

51. Special Appearance of English and American, filed 9-22-89.

52. Original Answer of English and American, filed 9-25-89.

53. INA's Supplemental Answer to Plaintiffs' Second Amended Petition, filed 11-03-89.

54. Defendant Youell and Companies Supplemental Answer to Plaintiffs' Second Amended Petition, filed 11-08-89.

55. NL's Supplemental Answer, filed 11-09-89.

56. NL's Amended Response to Getty's Second Set Request for Admissions, filed 11-13-89.

57. Supplemental Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-14-89.

58. Second Supplemental Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-16-89.

59. Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 11-16-89.

60. Plaintiffs' Third Amended Petition, filed 11-16-89.

61. Defendant INA's Second Amended Answer, filed 11-16-89.

62. Youell and Companies' Second Amended Answer, filed 11-16-89.

63. Affidavit of W. Allen Brumley in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 12-21-89.

64. Order Denying Plaintiffs' Motion for Summary Judgment, signed 11-17-89.

65. Defendants NL, INA and Youell's Motion for Summary Judgment and Affidavit of Douglas Haldane, filed 11-28-89.

66. Plaintiffs' Second Motion for Partial Summary Judgment, filed 12-21-89.

67. English and American's Response to Defendants' Motion for Summary Judgment, filed 01-05-90.

68. Plaintiffs' Response to Defendants' Second Motion for Summary Judgment, filed 01-05-90.

69. Defendants' Reply to Response to Motion for Summary Judgment, filed 1-11-90.

70. Letter from Judge Lindsay to all attorneys, dated 1-26-90.

71. Appendix to Defendants' Amended Motion for Summary Judgment, filed 2-08-90.

72. Defendants' Amended Motion for Summary Judgment, filed 2-08-90.

73. Order Setting Trial and Pretrial Conference, signed 2-12-90.

74. Defendants' Supplement to Amended Motion for Summary Judgment, filed 2-22-90.

75. Plaintiffs' Fourth Amended Petition, filed 2-27-90.

76. English and American's Response to Defendants' Amended Motion for Summary Judgment, filed 3-02-90.

77. Plaintiffs' Response to Defendants' (Third) Motion for Summary Judgment, filed 3-02-90.

78. Letter from Judge Lindsay to Counsel, Setting Trial for April 9, 1990, dated 3-05-90.

79. Supplemental Response to Interrogatories filed by INA, filed 3-08-90.

80. Plaintiffs' First Supplemental Responses to INA's Request for Admissions, filed 3-09-90.

81. Defendant NL's Answers to Plaintiffs' Third Set Request for Admissions, filed 3-16-90.

82. NL's answers to Plaintiffs' Fourth Set Request for Admissions, filed 3-23-90.

83. Order Regarding Pleadings Considered Part of Summary Judgment Record, signed 3-23-90.

84. First Amended Answer of NL Industries, filed 3-30-90.

85. Defendant INA's Third Amended Answer, filed 3-30-90.

86. Order After Pretrial Conference, signed 3-30-90.

87. Joint Pretrial Order, filed 4-04-90.

88. Order for Separate Trial on 4-09-90, signed 4-09-90.

89. Charge of the Court and Verdict of the Jury, filed 4-___-90.

90. Plaintiffs' Motion for Entry of Interlocutory Judgment and Hearing on Entry of Summary Judgment, filed 4-24-90.

91. Defendants' Motion to Sever and Abate Third Party Claims, filed 5-02-90.

92. Order of Severance and Abatement, signed 5-03-90.

93. Order Denying Plaintiffs' Motion to Make the Record of the Trial Part of the Summary Judgment Record, signed 5-03-90.

94. Order Granting Defendants' Motion for Summary Judgment, signed 5-03-90.

95. The Court's docket sheet.

96. Clerk's Certificate of Deposit in Lieu of Cash Bond.

97. Certified bill of costs.

98. This Designation of Transcript.

99. Deposition of Russell Keenan (Vol. 1, 7/7/89 and Vol. 2, 10/3/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant

to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

100. Deposition of Donis McCluskey (Vol. 1, 7/20/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

101. Deposition of Earnest Tate (Vol. 1, 8/28/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

102. Deposition of John Carpé (Vol. 1, 8/29/89 and Vol. 2, 9/12/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

103. Deposition of Cloy Monzingo (Vol. 1, 10/17/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to Photocopy same.

104. Deposition of James B. Merrell (Vol. 1, 10/26/89 and Vol. 2, 10/27/89), filed with the Court, the original of which is to be

forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

105. Deposition of W. Allen Brumley (Vol. 1, 11/7/89 and Vol. 2, 11/7/89), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

106. Deposition of Michael G. Lamont (Vol. 1, 4/4/90), filed with the Court, the original of which is to be forwarded to the Court of Appeals, pursuant to Order of the 280th District Court, to avoid the necessity for the District Clerk to photocopy same.

Respectfully submitted,

SHEINFELD, MALEY & KAY
A Professional Corporation

BY: _____
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ATTORNEYS FOR PLAINTIFFS
GETTY OIL COMPANY AND
TEXACO INC.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Amended Designation of Transcript was served upon counsel of record as listed below by certified mail, return receipt requested, on this ___ day of June, 1990.

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APPENDIX E

NO. 89-01695

GETTY OIL CORPORATION, Succeeded by and a Division of TEXACO, INC., Plaintiff, VS. INSURANCE COMPANY OF NORTH AMERICA; NL INDUSTRIES, INC., d/b/a NL TREATING CHEMICALS INC.; and YOUELL & COMPANIES, Defendants.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 280TH JUDICIAL DISTRICT

AMENDED MOTION FOR SUMMARY JUDGMENT

Defendants NL Industries, Inc. ("NL"), Insurance Company of North America ("INA") and Youell and Companies ("Youell") move for summary judgment pursuant to Rule 166a of the Texas Rules of Civil Procedure.

I.

Preliminary Statement

Defendants request summary judgment on the following grounds:

1. As a matter of law, the NL-Getty contract under which Plaintiff has sued cannot be construed to provide additional insured status for Getty under NL's insurance policies.

2. The scheme of insurance and indemnity contained in the NL-Getty contract violates the Texas Oil Field Anti-Indemnity Statute is therefore void and unenforceable.

3. Texaco's claims are barred by res judicata and collateral estoppel.

Each of these grounds forms an independent basis for summary judgment. There are no genuine issues of material fact precluding summary judgment on any of these grounds.

II.

Background Facts

On November 22, 1983, Getty sent Carl Duncan, an independent contractor working for Getty, to the site of a well owned by Getty to perform some welding work. The well was a producing oil well. During the welding on the well's horse-head, an accident occurred which resulted in Mr. Duncan's death.

The Duncan plaintiffs sued Getty, Texaco, NL and others.[1] Getty and Texaco cross-claimed against NL for contribution and indemnity based on the "work order conditions" of a Getty purchase order, HB-5357 (Exhibit "A" of Texaco's 1st Amended Original Petition in the present suit). Exhibit 1.[2] The jury found Getty solely

---

[1] *Duncan, et al. v. Getty Oil Corporation, et al.*, Cause No. 84-S-0194-C in the 130th Judicial District Court of Matagorda County, Texas (hereinafter, "*Duncan*").

[2] Exhibits, unless otherwise indicated, are contained in Appendix C.

negligent and grossly negligent, and exonerated NL from any wrongdoing. All product liability claims against NL were rejected. The Court rendered Judgment on this verdict and also held that NL was not liable to Getty or Texaco for contribution or indemnity. This judgment was affirmed on appeal.

Notwithstanding the loss on their cross-claim in the *Duncan* suit, Texaco filed this suit in Galveston County contending that the work order conditions of HB-5357 required NL to make Getty an additional insured on NL'S insurance policies. The suit was removed to Federal Court and was ultimately dismissed by The Honorable Hugh Gibson on the basis of res judicata and collateral estoppel. Exhibit 2. The Fifth Circuit, without addressing the res judicata and collateral estoppel arguments, remanded the case to Judge Gibson because of a diversity issue. Judge Gibson later remanded the case to state court and it was ultimately transferred to this court.

III.
Texaco's Construction Of The Contract Is Wrong As A Matter Of Law

Contrary to Texaco's claims, HB-5357 does not require NL to make Getty an additional insured on NL's insurance policies. The term "additional insured" never appears in HB-5357. Instead, paragraph 4 of the work order conditions (titled "Insurance and Indemnity") states merely that NL's insurance "shall extend to and protect" Getty "to the full amount of such coverages." Under Texas law, such language does not require an indemnitor such as NL to provide insurance covering the

negligence of an indemnitee such as Getty. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (Tex. 1972).

In *Fireman's Fund*, the Texas Supreme Court, construing a contractual provision nearly identical to the one involved here, held as a matter of law that an agreement to purchase insurance "for the protection of" an indemnitee does not create an obligation to provide insurance covering the indemnitee's negligent acts.[3]

The insurance provision involved in *Fireman's Fund* is substantially similar to the insurance provision in HB-5357. It provided:

> 12. LIABILITY COVERAGE
>
> The Contractor shall *protect* the Owner . . . against all liabilities . . . or damages . . . growing out of the performance of work . . .
>
> * * *

---

[3] The same result necessarily follows from ordinary rules of contract construction. A contract is to be strictly construed against its drafter; here, Getty. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). It would have been easy for Getty to use the term "additional insured" if that is what it meant. Indeed, Getty used that terminology in its contract with Carl Duncan. Exhibit 9. Since Getty did not use the term "additional insured" in HB-5357, it cannot be construed to require NL to make Getty an additional insured. Similarly, the contract states that NL "shall not be held responsible for any . . . expenses . . . directly, solely, and proximately caused by the negligence of" Getty. Thus, NL cannot be responsible for the insurance expense attributable to Getty's sole negligence.

> Limits for Liability Insurance shall be not less than $100,000 for injury to one person, $300,000 for injury to more than one person and $100,000 for property damage.
>
> * * *
>
> In addition to the Liability Insurance *for the protection of* the Owner and Architect-Engineer, the Contractor shall . . . maintain Liability Insurance for injury and/or death to any of his employees and/or to other persons. . . .

490 S.W.2d at 821 (emphasis added). A separate paragraph of the contract in *Fireman's Fund* also provided that the Contractor "shall specifically and distinctly assume and do so assume all risks of damage or injury from any cause except negligence of the Owner." *Id.* Similarly, paragraph 4 of the work order conditions of HB-5357 states that NL shall not have any responsibility for damages caused by the sole negligence of Getty.

The trial court and court of appeals in *Fireman's Fund* held that the insurance provisions of the contract rendered the contractor and its insurers liable for the indemnitee's negligence. The Texas Supreme Court reversed that holding and held as a matter of law that the insurance provisions did not require coverage of the indemnitee's negligence and could not render the contractor or its insuror liable for the indemnitee's negligence:

> We cannot agree with the contention of Byrne and Commercial that the requirement in Section 12 that Wallace carry certain liability insurance *for the protection of* General Motors evidenced an intention to cover the negligent acts of the latter. While the meaning of the contract provisions are

> not clear, the most reasonable construction is that they were to assure performance of the indemnification agreement as entered into by the parties. Such provisions are often required to guard against insolvency of the indemnitor, and they should not be considered as any evidence of intent to broaden the contractual indemnity obligation.
>
> * * *
>
> Therefore, we disapprove the holdings of the lower courts to the contrary.

490 S.W.2d at 823 (emphasis added). *Accord, Nesom v. Chevron U.S.A., Inc.*, 633 F. Supp. 55, 59 (E.D. La. 1984). The Supreme Court's holding applies directly to the present case. The only permissible reading of the contract is the one urged by NL and applied by the Texas Supreme Court in *Fireman's Fund*. The insurance provision cannot broaden NL's liability for Getty's negligence and NL is not required to provide coverage for Getty's sole negligence.

The Texas Supreme Court's holding in *Fireman's Fund* has been made even more compelling by later decisions. *Fireman's Fund* was decided under the "clear and unequivocal" test then applied to indemnity agreements. The Texas Supreme Court later adopted the even stricter "express negligence" doctrine which prohibits attempts to render one party liable for another's negligence where the express negligence test is not met. *Ethyl v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987). The "express negligence" doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must state that intent in specific terms

within the four corners of the contract. *Ethyl Corp.*, 725 S.W.2d at 708. The Supreme Court's reason for adopting the express negligence doctrine applies here:

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.

Id. at 707-08. Here, Texaco is trying to do indirectly what the Texas Supreme Court and the legislature have prohibited – to render NL and its insurors liability for Getty's sole negligence by clever draftmanship. It cannot do so. *See Haring v. Bay Rock Corp.*, 773 S.W.2d 676 (Tex. App. – San Antonio 1989, no writ) (Under express negligence doctrine and anti-indemnity statute, regardless of whether contractor breached a covenant in the contract, other party was not entitled to be indemnified for damages he was required to pay because of his own fault).

It must be emphasized that, under *Fireman's Fund* and *Ethyl*, the construction of this contractual provision is a legal issue for the Court and can never be a jury issue. As a general rule, construction of a contract is a question of law for the court. *Louisiana-Pacific Corp. v. Cain*, 519 S.W.2d 528, 529 (Tex. Civ. App. – Beumont 1974, writ ref'd n.r.e.). Ordinarily, extrinsic evidence is admissible only if,

after applying applicable rules of construction, genuine uncertainty remains as to the proper construction of the contract. However, in construing indemnity and insurance provisions of a contract like the one involved here and in *Fireman's Fund,* extrinsic evidence is never admissible or relevant; *any* ambiguity *must* be resolved against holding one party liable for the other party's negligence. *Monsanto Company v. Owens Corning Fiberglass Corp.,* 764 S.W.2d 293 (Tex. App. – Houston [1st Dist.] 1988, no writ). The insurance provision in the contract does not alter this result. *See Fireman's Fund, supra; Adams v. Spring Valley Construction Co.,* 728 S.W.2d 412 (Tex. App. – Dallas 1987, writ ref'd n.r.e.).

As a matter of law, HB-5357 and the provisions of the work order conditions of HB-5357 cannot be construed to require NL to provide insurance covering Getty's solely negligent acts. Defendants are therefore entitled to summary judgment.

IV.

The Texas Anti-Indemnity Statute Bars Texaco's Claims

A. The Texas Statute

Although the rules established by *Fireman's Fund, Ethyl* and their progeny are strict, the legislature felt that even more stringent protection was needed for oil field contractors. Accordingly, the legislature enacted the Texas Oil Field Anti-Indemnity Statute; Tex. Rev. Civ. Stat. Ann. art. 2212b (Vernon 1979) (hereafter cited as "Article 2212b").

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